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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Elgin, Joliet and Eastern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 3, 1962.

OPINIONS BELOW.

The memorandum of the district court (App. 467-70)[1] is reported at 196 F. Supp. 158, 166 (N. D. Ill. 1961). This memorandum contained two separate decrees, one dismissing the complaint and the other entering an injunction

[1] The Joint Appendix to the Briefs filed in the Court below contains the material relevant to present issues and will be cited "App. ....."

pending appeal. Separate appeals were taken from both decrees, and the court of appeals rendered two separate, but connected, opinions. These opinions of the court of appeals (Appendix A, *infra*, pp. A-1 - A-18), are reported at 302 F. 2d 540, 545 (7th Cir. May 3 and 4, 1962).

JURISDICTION.

The judgment of the court of appeals was entered May 3, 1962 (Appendix A, *infra*, pp. A-1 - A-8). Petition for rehearing was denied by the court of appeals on June 7, 1962. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

QUESTION PRESENTED.

Whether, when an appeal is immediately taken from a district court's holding that, under the Norris-LaGuardia Act, it is without jurisdiction to enjoin permanently a strike in a Railway Labor Act injunction suit brought by a railroad, the Norris-LaGuardia Act further withdraws the district court's judicial power, conferred by Article III of the Constitution and the All-Writs section of the Judicial Code, to enter an injunction of the strike pending appeal by the railroad, to maintain the *status quo* and preserve the case for decision by the court of appeals.

STATUTES AND RULES INVOLVED.

Sections 1, 4, 5, 7 and 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U. S. C. §§ 101, 104, 105, 107 and 109, are set forth in Appendix B hereto, *infra*, pp. B-1 - B-4. The All-Writs statute, 1 Stat. 73, 28 U. S. C. § 1651, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 62(c), F. R. Civ. P. provides:

> Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

STATEMENT.

Elgin, Joliet and Eastern Railway Company filed a suit on May 19, 1961, in the district court seeking to enjoin the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors and Brakemen (hereinafter "brotherhoods") from striking on the following day over certain collective bargining demands. The district court entered a temporary restraining order on May 19, 1961. This order was continued in effect by agreement pending final action by the court after a hearing on the merits. Such a hearing was held, and thereafter, on June 21, 1961, the court denied petitioner's application for a permanent injunction and dismissed the complaint.

The following day petitioner filed a notice of appeal to the court of appeals and contemporaneously applied to the district court for an injunction against any strike during the pendency of the appeal. The same day, June 22, 1961, after hearing argument, the court entered a decree enjoining the strike until such time as the Elgin, Joliet and

Eastern Railway Company's appeal was decided by the court of appeals (App. 469-70).

The district court based its decree of June 22, 1961, on the following findings (Fdgs. 2-5; App. 467-68):

> 2. Plaintiff's system serves and circumscribes the vast industrial concentration of metropolitan Chicago, Illinois. It is an integral part of the nationwide railway systems of the United States and connects and interchanges freight with thirty-three common carriers by rail which enter the City of Chicago. It provides terminal and switching facilities for more than 600 industries and renders railroad service to thousands of shippers annually. It carries large quantities of United States national defense supplies and equipment, and other freight needed for the maintenance of the health, comfort and welfare of the public.
>
> 3. If defendants were to strike during the pendency of plaintiff's appeal, such action would be seriously disruptive, in that the public is not prepared for such action and the industries served by plaintiff could not protect themselves from interference with services rendered to them.
>
> 4. The Court has inquired into and considered the equities of the parties herein and has further considered the equities of the general public as they would be affected by this matter. The Court has balanced the equities and found the equities of the general public greater than those of the defendants herein.
>
> 5. The Court finds that its judgment and decree heretofore entered herein on the issues in dispute include matters of first impression in the United States Courts and no settled rules of law have heretofore been laid down concerning those issues.

It also made the following conclusions of Law (Con. 1-2, App. 468):

> 1. The jurisdiction of this Court to grant an injunction during the pendency of this appeal exists under the provisions of Rule 62(c) of the Federal

Rules of Civil Procedure and the Judicial Code and the inherent powers of the Court.

2. The jurisdiction of this Court in granting an injunction during the pendency of this appeal under the provisions of Rule 62(c) is not limited by the provisions of the Norris-LaGuardia Act (29 U. S. C. Section 101 *et seq.*).

Thereafter all three brotherhoods perfected appeals to the court of appeals from the June 22, 1961, injunction pending appeal. The appeals of the brotherhoods and this appeal of Elgin, Joliet and Eastern Railway Company were heard by the court of appeals on the same day, but the brotherhoods urged that their appeals from the June 22, 1961, order be decided prior to the Railway's appeal from the June 21, 1961, decree. The court of appeals so acted, rendering two separate judgments and opinions. On May 3, 1962, it rendered judgment on the brotherhood's appeal from the June 22, 1961, decree, reversing the district court. It is this judgment which is the subject of this Petition for Writ of Certiorari. On the following day, May 4, 1962, the court of appeals rendered judgment on the Railway's appeal from the June 21, 1961, decree, affirming the district court. This judgment is the subject of a separate Petition for Writ of Certiorari, filed by the Railway contemporaneously with the filing of this Petition.

REASONS FOR GRANTING THE WRIT.

1. The court of appeals has decided an important issue of jurisdiction for the federal courts which has not been, but should be, settled by this Court—an issue involving the interrelationship of the Norris-LaGuardia Act with the judicial power vesting in the district courts by virtue of Article III of the Constitution, the All-Writs section of the Judicial Code and the congressional creation of district courts to exercise the judicial power of the United States.

2. The decision of the court of appeals is in conflict

with the decisions of every other court of appeals and district court which has dealt with the question.

3. The decision of the court of appeals is inconsistent with the same court's disposition of the identical question in 1958, in *Chicago & North Western Ry. Co.* v. *Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959).

4. The decision of the court of appeals in relying upon *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956), *dismissed as moot*, 352 U. S. 995, which was overruled by this Court's decision in *Chicago River and Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 353 U. S. 30 (1957), is in conflict with the principle laid down by this Court in the *Chicago River* case.

5. The decision of the court of appeals is wrong and will be productive of extraordinary disorder in the effective discharge by the lower federal courts of their responsibilities, and final resolution by this Court of the question presented is vital to the administration by the lower federal courts of Railway Labor Act and other injunction cases.

6. In denying the trial court power to preserve the existence of the pending controversy in order to permit appellate review, the decision of the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The question presented is of first magnitude for the railway and airline industries of the United States, railway and airline labor organizations, the public and, most important, the federal judiciary.

8. The question presented squarely poses an issue which this Court expressly found inadvisable to answer under the circumstances in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960).

ARGUMENT.

A. This case squarely presents to this Court for the first time a question which it found inadvisable to answer in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960):

> There are other subsidiary questions raised with reference to . . . an injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time.

We submit that this problem is of first magnitude for the railway and airline industries of the United States, railway and airline labor organizations, the public and, most importantly, the federal judiciary. It concerns a highly significant question of federal jurisdiction and statutory interpretation, the final resolution of which by this Court is vital to the administration by the lower federal courts of Railway Labor Act and other injunction cases.

The decision of the court of appeals, the first decision in the United States finding a district court impotent to grant an injunction pending appeal, carries with it enormously far-reaching implications. Our discussion will treat with but two main consequences: First, the decision, in direct conflict with decisions of this Court, has established a serious and unwarranted encroachment on the traditional exercise of federal judicial power. Second, the decision will be productive of extraordinary disorder in the discharge by the inferior federal courts of their responsibilities.

Prior to the decision in the case at bar the power of the

federal courts to preserve the *status quo* pending appeal was uniformly recognized by the courts. And prior to the *North Western* case, *supra*, there was no reported decision, either before or after the enactment of the Norris-LaGuardia Act (29 U. S. C. § 101-15), in which this power was effectively questioned. In that case the court of appeals denied a motion to dismiss the district court's injunction pending appeal, thereby refusing to adopt the position which it has now taken. *Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959). This Court expressly found it inadvisable to rule upon the question under the circumstances. *Order of Railroad Telegraphers v. Chicago & North Western Ry. Co.*, 362 U. S. 330, 342 (1960).

In the instant case the court of appeals decision conflicts directly with an unbroken line of precedents which has established and defined jurisdictional power to grant stay orders pending appeal. In reaching its decision the court of appeals has completely ignored an essential source of federal judicial power, the All-Writs provision of the Judicial Code (28 U. S. C. § 1651), and has misinterpreted the fundamental relationship between it and the Federal Rules of Civil Procedure. Moreover, it also has failed to differentiate among the several types of equitable remedies which can be provided by a federal court. This failure has produced a sweeping and erroneous curtailment of judicial power by extending the Norris-LaGuardia Act far beyond its express terms and intent without regard to the teachings of legislative history. We submit that these several departures from established federal law, when taken with the erroneous interpretation of the Norris-LaGuardia Act, call for the granting of a writ of certiorari.

B. The primary issue—whether, subsequent to its finding of no jurisdiction to issue a permanent injunction, a federal court is ousted by the Norris-LaGuardia Act of

jurisdiction to issue a stay pending appeal—must be approached in the light of the sources of judicial power and the background and purposes of the Norris-LaGuardia Act.

As courts established by Congress pursuant to Article III of the Constitution of the United States, the district courts are invested with the full judicial power of the United States which has been conferred upon them by Congressional Act. Article III, Section 1; *Cary* v. *Curtis*, 3 How. 236, 245 (1845); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 328-333 (1816). At the first session of Congress in 1789, the session at which Congress created the district courts and thereby first exercised its authority to create inferior courts, Congress also enacted, as part of the Judiciary Act, the sweeping All-Writs section which survives today. 1 Stat. 73; 28 U. S. C. § 1651. The All-Writs section in applicable part provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

That this section codifies the inherent judicial power to grant a stay pending appeal was reaffirmed in modern times in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4 (1942). This Court there held that the court of appeals had power wholly apart from the Federal Communications Act to enter a stay preserving the *status quo* pending appeal from an order of the Federal Communications Commission. The FCC contended that the court was without power to grant a stay pending appeal, because the Communications Act granted no such power. Mr. Justice Frankfurter, in rejecting this argument, stated at pp. 9-10 as follows:

> No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite

> anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice,[4] a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U.S. 536.

As authority for this power the Court cited in Footnote 4, 316 U. S. at 10, to the All-Writs Section as follows:

> [4]Section 262 of the Judicial Code, 28 U. S. C. § 377, empowers the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This provision appeared in the very first Judiciary Act, 1 Stat. 73, 81-82. Compare District of Columbia Code (1940 ed.) Title 11-208, authorizing the Court of Appeals for the District of Columbia "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." 31 Stat. 1189, 1227.

The earlier decisions by this Court on this point emphasize the inherent power of the courts. For example, in *Hovey* v. *McDonald*, 109 U. S. 150 (1883), an assignee in bankruptcy filed a bill in the Supreme Court of the District of Columbia to restrain collection by the debtor of $200,000. A restraining order and subsequently a preliminary injunction were granted according to the prayer for relief. Thereafter, this and another injunction order were vacated. The question then arose as to whether an appeal automatically operated as a supersedeas.

This Court stated that the decree was not affected by the appeal, although it was well within the power of the court to have entered an injunction during the pendency

of the appeal. 109 U. S. at 161-62. Recognizing that the court had the inherent power to preserve the *status quo*, this Court stated at page 161 that:

> This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered . . . .

The Court then discussed Equity Rule 93, which was adopted in 1878 and which was an antecedent of Equity Rule 74 (226 U. S. 670-71), the immediate predecessor of Rule 62(c) of the Federal Rules of Civil Procedure. Rule 93 stated that

> When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion . . . make an order suspending or modifying the injunction during the pendency of the appeal . . . .

The *Hovey* Court viewed this power as inherent federal power and stated that Equity Rule 93 was adopted "In recognition of the power, ..." 109 U. S. at 161.[2]

Accordingly, it seems clear that the Equity Rule did not *itself* grant the power to issue an injunction pending appeal since such power already existed all along. This view of the relationship between the rules and the judicial power itself has prevailed until the Court of Appeals decided the case at bar.

Federal Rule 82 states the underlying fact that the Federal Rules neither confer nor extend the jurisdiction of the United States district courts. The underlying sources

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2. Other early cases bear out the exercise of this power under various circumstances. *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 91-92 (1930); *Virginian Ry. v. United States*, 272 U. S. 658, 669 (1926); *Cumberland Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 260 U. S. 212, 219 (1922); *Magnum Import Co. v. Coty*, 262 U. S. 159, 162-63 (1923); *In re McKenzie*, 180 U. S. 536, 550-51 (1901) and *In re Claasen*, 140 U. S. 200, 207-08 (1891).

of judicial power are found not in the Rules, but elsewhere. For example, this relationship was recognized by this Court recently in connection with Federal Rule 41(b). In *Link* v. *Wabash R. Co.*, 30 U. S. Law Week 4534 (United States Supreme Court, June 25, 1962), this Court characterized the authority of a Court to dismiss *sua sponte* for lack of prosecution as "inherent" and of "ancient origin", and stated that this power was "expressly recognized" in Rule 41(b). 30 U. S. Law Week at 4535. In addition, as Professor Moore points out, "Rule 62(c) is merely expressive of a power *inherent in the court* to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify." *Moore's Federal Practice*, ¶ 62.05. (Emphasis added.) However, the court of appeals in its opinion ignored this inherent power and the All Writs section completely, never even mentioned them, and stated that Rules 65(e) and 82 "must be considered as qualifying the *authority granted* in Rule 62(c), F. R. C. P." (Appendix A, *infra*, p. A-4; emphasis added.) It is precisely this basic misconception, we submit, which led the court of appeals to and permeated its erroneous decision. That court never looked beyond the Federal Rules of Civil Procedure for the district court's power, a power which for many years has existed wholly independent of the Rules.

Since, as our discussion will demonstrate, the Norris-LaGuardia Act does not apply to injunctions pending appeal, the error of the court of appeals in restricting its attention to the Federal Rules of Civil Procedure would not necessarily have foreclosed a correct decision on the merits of the appeal. However, the error became crucial and determinative when the court of appeals held that the Norris-LaGuardia Act *did* apply to injunctions pending appeal and then went on to balance that Act with the Federal Rules, themselves not a source of power, instead of accommodating the Norris-LaGuardia Act, withholding jurisdic-

tion, to the All-Writs section and the inherent judicial power, granting jurisdiction. See *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 353 U. S. 30 (1957). Only a view of stunted judicial power could flow from this latter choice; a view which the court of appeals chose to adopt.

We assert that the court of appeals erroneously interpreted the Norris-LaGuardia Act, and we submit that this interpretation should not be allowed to stand. The court's holding overruled *sub silentio* a long line of lower federal court labor injunction cases decided since the enactment of the Act.[3] In these cases injunctions pending appeal were uniformly granted even though the Norris-LaGuardia Act had been held or had arguably applied to oust jurisdiction in the main case. The approach of these courts in this situation is wholly consistent with a proper analysis of the statute.

The court of appeals, in one sentence barren of authority, held that an injunction pending appeal was a "temporary injunction" within the meaning of the Norris-LaGuardia Act. There is no authority whatever for the court's proposition that:

> the injunction here in question is limited by its terms to the time required for a decision by this Court and it is, in fact, a temporary injunction. Appendix A, *infra*, p. A-2.

This unprecedented mingling of different equitable reme-

3. *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir. 1956), aff'd 353 U. S. 30 (1957); *Norfolk & Portsmouth Belt Line R. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957), cert. den. 355 U. S. 914 (1958); *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir. 1945), cert. den. 325 U. S. 852 (1945); *Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*, 36 CCH Labor Cases, ¶ 65,103 (N. D. Ill. 1958), motion to dismiss Federal Rule 62(c) injunction denied, 36 CCH Labor Cases, ¶ 65,283 (7th Cir. 1959).

dies does violence to the plain meaning of the Act. It is clear that the statutory term "temporary injunction" is a term of art, inserted as a label for a specific type of injunction the issuance of which by the courts was, prior to the enactment of the statute in 1932, subject to considerable abuse.

The Norris-LaGuardia Act withdrew jurisdiction from the courts of the United States to issue any "restraining order or temporary or permanent injunction" under certain circumstances. This term appears in Sections 1, 4, 5, 7 and 9. 29 U. S. C. § 101-15. There is no mention anywhere in the statute of "injunction pending appeal" or any other similar term. In the context of the history of judicial abuses which led to the enactment of this statute it is clear that the three enumerated types of equitable relief did not purport to include the injunction pending appeal or the *status quo* injunction.

The "temporary injunction" (apparently identical to the "preliminary injunction" of Rule 65 of the Federal Rules of Civil Procedure) was and is a provisional remedy granted by the trial court *prior to* a full hearing on the merits for a permanent injunction.[4] The reason it was excluded by the Act from the arsenal of traditional equitable remedies was the widespread practice in failure of evidentiary safeguards.

During the activity leading up to the enactment of the statute in 1932 Frankfurter and Greene published an exhaustive study of the federal cases involving injunctions in labor disputes. The study analyzed the types of injunctive relief and categorized them into temporary restraining orders, preliminary injunctions and permanent injunctions.

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4. The relief granted in these circumstances by the federal courts in the cases cited in footnote 3 at p. 13, *supra*, was called at various times a stay pending appeal, an injunction pending appeal, a *status quo* injunction and a continuance of the *status quo*.

Frankfurter and Greene, *The Labor Injunction*, 325-26 (1930). These types of relief were geared to the business of the trial court and had definite and fixed characteristics. The preliminary or temporary injunction, issued prior to a full hearing on the merits before the trial court, was frequently granted on untrustworthy affidavits and had a devastating effect on labor. Frankfurter and Greene discussed the "treachery of affidavits" and their inaccuracy and doubtful evidentiary value. *Id.* at 77.

They also state that, of eighty-eight temporary injunctions reported in the Federal Reporter, sixty-eight never were appealed from, and fifty-six, whether appealed or not, never went to final hearing on the merits. In New York of thirty-five temporary injunctions issued between 1923 and 1927 in no instance was there any further litigation. After analyzing possible reasons for this, Frankfurter and Greene conclude that it is "undeniably the fact" that the preliminary injunction in the main terminates the controversy. "The tentative truth rests in making ultimate truth irrelevant." *Id.* at 80.

Moreover, legislative history supports the view, as does *expressio unius est exclusio alterius*, that Congress intended to exclude from the prohibitions of Norris-LaGuardia all but those injunctions mentioned. The Senate Committee Report (S. Rep. 163, 72d Cong. 1st. Sess. 25 (1932), for example, stated as follows:

> The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts *in that class of cases* wherein these evils have grown up and become intolerable. (Emphasis added.)

The injunction pending appeal was not such an evil. Indeed, no mention of the injunction pending appeal has been found in Congressional debates or in reported court decisions preceding enactment of the Norris-LaGuardia

Act. The injunction pending appeal, issued or not in the discretion of the trial court after the entire hearing on the merits, carries with it none of the potential abuses sought to be proscribed. Safeguards such as testimony in open court, cross-examination and verified pleadings required by Section 7 to be present prior to issuance of a temporary injunction, have undoubtedly been met by the time the court is asked to maintain the *status quo* pending appeal.

We also submit that any doubts should be resolved in favor of an accommodation of the Norris-LaGuardia Act to the All-Writs section and the inherent power of the court. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957); Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958). It is well settled that the Act cannot always be given literal application, although the court of appeals has so applied it. The principle of accommodation of the Norris-LaGuardia Act, espoused by this Court in the *Chicago River* case, has permitted injunctive relief in many cases where a literal reading of the Act would require the court to conclude that it had no jurisdiction. For example, there is no longer any question that a court may enjoin violations of the Railway Labor Act irrespective of the Norris-LaGuardia Act provisions.

In the *Chicago River* case this Court held that the anti-injunction policy of the Norris-LaGuardia Act was superseded by Railway Labor Act policy to protect the jurisdiction of the National Railroad Adjustment Board. Thus, Board jurisdiction is protected by the issuance of injunctive relief. In this way the Board may deliberate and decide a controversy without coercion or pressure brought against

it or any of the parties by a work stoppage and its resultant economic chaos.

Nevertheless, the court of appeals has now held, despite settled law empowering a court to protect by injunction the jurisdiction of federal statutory agencies irrespective of Norris-LaGuardia, that an injunction may not issue to protect the jurisdiction of the federal courts in which is vested the judicial power of the United States. Are the courts entitled to less deference in these matters?

Furthermore, the opinion of the court of appeals has also disregarded the extremely important case of *United States v. United Mine Workers of America*, 330 U. S. 258 (1947). Although the case did not involve an injunction pending appeal, it recognized the principle of protective jurisdiction where Norris-LaGuardia was urged as overriding the court's power to preserve a controversy for decision. The Court stated:

> . . . [T]he power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question [applicability of Norris-LaGuardia]. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction. 330 U. S. at 290.

C. That portion of the court of appeals decision which relies on *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956), is in direct conflict with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

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5. The principle of *Chicago River* is especially applicable here because the termination of a controversy before the Adjustment Board is closely analogous to the termination of a court controversy in a reviewing court. There is, therefore, no problem in the instant case of not having a procedure for the type of final decision which exists before the Board. 353 U. S. at 42, n. 24.

Central of Georgia was decided February 16, 1956, four days after the decision on February 6, 1956, by the Court of Appeals for the Seventh Circuit of *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 229 F. 2d 926 (7th Cir. 1956). The Fifth Circuit held, as the Court of Appeals for the Seventh Circuit states:

> . . . [T]he Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin a strike . . . to preserve the *status quo* of the controversy before the Railroad Adjustment Board pending a decision by that Board. (App. A-6.)

The Seventh Circuit, on the other hand, held that the Norris-LaGuardia Act does *not* oust court jurisdiction to preserve the *status quo*.

Certiorari in both cases was then applied for and, because of the conflict between the circuits, granted. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 352 U. S. 865; *Chicago River & Indiana R. Co.* v. *Brotherhood of Railroad Trainmen*, 352 U. S. 865. Subsequently, however, the *Central of Georgia* writ was dismissed for mootness. 352 U. S. 995.

Thereafter, this Court went on to decide the Seventh Circuit case, which it affirmed. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).[6] This Court held that the anti-injunction policy of the Norris-LaGuardia Act should accommodate the Railway Labor Act policy to protect the jurisdiction of the National Railroad Adjustment Board. Accordingly, an injunction was upheld. Thus, the court of appeals decision

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6. "In addition to the importance of the question, there was a conflict in the decisions of the Courts of Appeals. *Brotherhood of Railroad Trainmen* v. *Central of Georgia Ry. Co.*, 229 F. 2d 901, decided by the Fifth Circuit, came to a conclusion contrary to that of the Seventh Circuit in this case. Certiorari had been granted in both cases, 352 U. S. 865, but we dismissed the writ in the *Central of Georgia* controversy upon a suggestion of [illegible]otness." 353 U. S. at 33, n. 3.

in the case at bar, is in large part, in direct conflict with a case decided by this Court.

D. In terms of financial injury alone, this precedent will undoubtedly cause incalculable future loss to both litigants and the public. The inability of the District Court to act in meritorious cases has the plain effect of substituting economic conflict for judicial review. A decision on the merits against a plaintiff-carrier in a Railway Labor Act injunction case will immediately free the defendant-labor organization to strike to achieve its demands. A complete cessation of rail service to the public would then ensue. Thus, extreme public and private injury are invited, a consequence which is wholly alien to the judicial system of the United States and which exists in no other area of litigation between private parties. The decision also establishes that a losing plaintiff-carrier in a Railway Labor Act injunction case has no effective right to judicial review. Circuit Judge Knoch, concurring, wrote:

> In other cases, almost invariably, when an appeal is taken, methods are available to maintain the status quo until the issues are resolved with ample provisions to protect all parties. There is, seemingly, inherent unfairness in a situation of this type where a reversal on appeal would represent an empty victory for the appellant. Appendix A, *infra* p. A-7.

Such deprivation of judicial review is in itself such a drastic departure from the basic constitutional and statutory rights which the legal system has established as to merit review by this Court.

E. The effect of the Court of Appeals' decision is, in most instances, to make the trial court the court of last resort. Irrespective of its desire for appellate guidance, and of the need for such guidance in the uniform administration of the National Railway Labor Act, the trial court may not preserve jurisdiction beyond the moment of its

decision. In cases similar to the case at bar which poses novel and difficult questions of law, especially questions of first impression, the burden on the trial court is intolerable.[7]

The instant case presents an excellent illustration. One of the most important reasons why the district court granted the stay pending appeal was its substantial doubt of the correctness of its decision. At the hearing on petitioner's motion for an injunction pending appeal, the court reasoned as follows:

> I have been doing a lot of research since yesterday on this matter, gentlemen. Yesterday when I decided this case—and I believe I decided it correctly, and while I believe I decided it correctly of course there are two steps above me—I don't know what ultimately will come in this matter. My judgment is that my decision is correct and it will stand up. But who am I to say that it will?
>
> I do believe this is a case of first impression. If I were founding this case upon well documented cases, cases almost on all fours, I would say that no injunction should be granted. (App. 266.)

And the following colloquy took place between counsel and the court:

> Mr. Naughton: . . . You are supposed to look at this case and decide whether you think there is any chance that you are incorrect. I look at this case and I

7. ". . . it must appear . . . that the district court entertains a serious doubt as to the correctness of its own decision . . . ." Mr. Justice Brandeis in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 673 (1926). ". . . The court found that novel and important questions concerning which there was serious doubt were presented by the assignment of errors . . . . Undoubtedly the court had authority in its discretion, upon entry of the decree dismissing the bill, to stay the enforcement . . . pending appeal . . . . We think it clear that the court did not abuse its discretion in granting the stay." *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 91-92 (1930). Compare also the court of appeals description of the question in the instant case as "perplexing."

find no chance whatsoever that your ruling is incorrect.

The Court: I am looking at it from that standpoint. I agree with your last statement, as far as I am concerned, but as the distinguished late Oliver Wendell Holmes said when he was 90 years old, and speaking about his experience in the Civil War, he said, "About 70 years ago I learned I was not God", and that is the reason for his approach in these problems, always considering that he might be wrong and that the administrative bodies or somebody else might be right. So I try to approach these things from the standpoint that I might be wrong, since the Supreme Court has said I was wrong in so many instances. (App. 262-63.)

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July , 1962.

APPENDIX A.

In the United States Court of Appeals

For the Seventh Circuit.

September Term 1961—April Session 1962

Nos. 13445 and 13447

Elgin, Joliet & Eastern Railway Company,
Plaintiff-Appellee,
v.
Brotherhood of Railroad Trainmen, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 3, 1962

Before Duffy, Knoch and Kiley, *Circuit Judges.*

Duffy, *Circuit Judge.* This is a companion case to No. 13444 wherein Elgin, Joliet & Eastern Railway Company is the plaintiff-appellant and the three brotherhoods, Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB), are the defendants-appellees. That action was brought to restrain a strike scheduled to commence on May 20, 1961. A temporary restraining order was entered on May 19, 1961, and was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits. Such a hearing was held. There-

after, the District Court vacated and dissolved the temporary restraining order, denied plaintiff's application for a permanent injunction, and dismissed the suit.

Plaintiff Railway Company promptly filed a notice of appeal. On June 22, 1961, on motion of the plaintiff, the District Court entered an order enjoining defendants from striking pending plaintiff's appeal. The Court found "the equities of the general public greater than those of the defendants" and that the issues include matters of first impression on which no settled rules have been laid down. The brotherhoods appealed from the order granting the injunction pending plaintiff's appeal.

Although the instant appeals and the appeal in No. 13444 were argued before us on the same date, the brotherhoods urge that the opinion in this case be handed down first, pointing out that if we first decide the issues in No. 13444, the important issue which they raise in the instant appeals would be moot.

Section 10 of the Norris-LaGuardia Act (29 U.S.C. Sec. 110) requires that all appeals from the issuance of a temporary injunction in a labor dispute be given precedence over all other appeals except older matters of the same character.

This case involves and grows out of a labor dispute. The parties are an employer and its employees. The injunction here in question is limited by its terms to the time required for a decision by this Court and it is, in fact, a temporary injunction. The Norris-LaGuardia Act applies to "any" temporary injuction in a labor dispute. We think the brotherhoods are entitled to have the decision in the instant appeals handed down prior to our decision in No. 13444.

The question presented by these appeals is, indeed, perplexing. No case has been cited to us, and we know

of none, which has specifically ruled on the issue here presented. The precise question was raised in this Court in *Chicago & North Western Railway Co.* v. *Order of Railroad Telegraphers, et al.*, 7 Cir., 264 F. 2d 254. However, in that case we held a permanent injunction should have been granted, and we did not decide the point here at issue.

Upon appeal of the *Telegraphers'* case, the Supreme Court stated, 352 U. S. 330, 342: "There are other subsidiary questions raised with reference to the validity of . . . an injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time."

Section 4 of the Norris-LaGuardia Act (29 U. S. C. Sec. 104) provides, in part: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment;" and "(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified."

This language of Section 4 seems clear and unambiguous. However, Rule 62(c), F.R.C.P., which has the effect of a statute (*Winsor* v. *Daumit*, 7 Cir., 179 F. 2d 475, 477), provides in part: "(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its decretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal

upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Consideration must also be given to the effect, if any, of Rule 65(e) and Rule 82, F.R.C.P. Rule 65 is entitled "Injunctions" and provides, in part: "(e) Employer and Employee; . . . These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; . . ."

Rule 82 provides: "Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

The various rules are entitled to equal respect. If possible, they should be given an interpretation which makes them consistent with each other. In our view, Rules 65(e) and 82, F.R.C.P. must be considered as qualifying the authority granted in Rule 62(c), F.R.C.P.

A recent case with somewhat similar facts is *Chicago, Rock Island & Pacific Railroad Co., et al.* v. *Switchmen's Union of North America, et al.*, 2 Cir., 292 F. 2d 61. The Railroad sued to enjoin a strike involving a major dispute over wages. The carrier pointed out the Switchmen's constitution provided for arbitration and contended the calling of the strike violated the Railway Labor Act and thus the union did not act in good faith. A temporary injunction was issued on the ground the union had not engaged in good faith efforts to reach a final agreement. The union appealed on the ground the Norris-LaGuardia Act withdraws jurisdiction from the district court to enjoin the strike. The carrier contended the temporary injunction should stand in the absence of a showing that it was clearly erroneous.

The Court of Appeals held that Section 4 of the Norris-

LaGuardia Act withdrew jurisdiction to enjoin the strike. The Court said, 292 F. 2d 61, 71:

> "Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the COMMAND of § 4 of the Norris-LaGuardia Act. That section uses the most emphatic words possible—'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent." (footnote omitted)

True, there is a distinction from the case at bar. The *Rock Island* case was an appeal from a temporary injunction pending a hearing on the merits, while the instant case is a temporary injunction pending an appeal. However, unless some distinction can be drawn between the impact of the Norris-La Guardia Act on an injunction issued *pendente lite* and a temporary injunction pending a hearing on appeal, the holding of the Second Circuit provides a guide for a decision on the issue before us.

Another case which might also be distinguished but, nevertheless, furnishes some guidance is *Brotherhood of Railroad Trainmen, Local Lodge No. 721, et al. v. Central of Georgia Railway Company*, 5 Cir., 229 F. 2d 901. There, the carrier sought injunctive relief. A temporary injunction was issued *pendente lite*, enjoining the union from endeavoring by self help (a strike) to effect a modifica-

tion of an award. The District Court held it was necessary to preserve the *status quo* pending a decision of the controversy before the Railroad Adjustment Board. The Court of Appeals reversed, holding the Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin a strike even if all that was sought was to preserve the *status quo* of the controversy before the Railroad Adjustment Board pending a decision by that Board.

In the case at bar, the issues were decided in favor of the unions. The Court held the carrier was not entitled to an injunction restraining the strike. However, by granting the injunction pending the appeal, the unions were restrained from carrying out the strike which they had called. The injunction was issued at the expense of the unions. In our view, the sweeping provisions of the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the temporary injunction pending the appeal.

The carrier suggests a labor dispute no longer exists. The unions do not have their pension plan and they were deprived of their right to strike. We hold the labor dispute does exist.

The temporary injunction issued pending appeal should not have been entered. The provision in the judgment restraining the brotherhoods from striking pending appeal should be stricken.

REVERSED.

Nos. 13445 and 13447

KNOCH, *Circuit Judge*. (Concurring) The Norris-LaGuardia Act as it now reads dictates the foregoing decision under the admitted facts of this particular case.

In other cases, almost invariably, when an appeal is taken, methods are available to maintain the status quo until the issues are resolved with ample provisions to protect all parties. There is, seemingly, inherent unfairness in a situation of this type where a reversal on appeal would represent an empty victory for the appellant.

However, this situation should not be remedied by judicial edict, but, rather by Congressional consideration.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, May 3, 1962.

Before

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Wm. G. Knoch, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.

Elgin, Joliet & Eastern Railway Company, *Plaintiff-Appellee,* vs. Brotherhood of Railroad Trainmen et al., *Defendants-Appellants*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13445-13447.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 22, 1961, enjoining defendants from striking pending the disposition of these appeals, as in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 13444 September Term, 1961—April Session, 1962.

Elgin, Joliet & Eastern Railway Company,
Plaintiff-Appellant,
v.
Brotherhood of Railroad Trainmen, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 4, 1962.

Before DUFFY, KNOCH and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This suit was brought against the Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB) to restrain a strike scheduled to commence at 6 a.m. on May 20, 1961. The District Court entered a temporary restraining order on May 19, 1961. This restraining order was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits.

On June 21, 1961, after the hearing on the merits, the District Court entered Findings of Fact and Conclusions of Law favorable to the defendants; the temporary restraining order was dissolved and the action was dismissed

at plaintiff's costs. Plaintiff forthwith filed a notice of appeal and moved for an injunction restraining defendants from striking pending said appeal. On June 22, 1961, the District Court granted plaintiff's motion for an injunction pending appeal stating that it did so pursuant to the provisions of Rule 62(c), F.R.C.P. "and the inherent powers of the Court." Defendant brotherhoods appealed from the order of June 22, 1961, granting the injunction pending appeal. These appeals have been designated in this Court as Nos. 13445 and 13447, and are being separately considered.

Plaintiff is a common carrier engaged in interstate commerce by railroad and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. Plaintiff's railroad system connects and interchanges freight with thirty-three common carriers by rail which enter the city of Chicago. Its capital stock is owned by the United States Steel Corporation.

The defendant brotherhoods are labor organizations, national in scope, and are subject to the provisions of the Railway Labor Act. The BRT is exclusive bargaining representative for 1200 employees, the BLFE for 400 firemen and the ORCB for 55 road conductors.

The dispute between the parties concerns non-contributory pensions supplemental to Railroad Retirement Act benefits. A pension plan known as II-B had expired by its terms on October 31, 1959. This pension plan as well as a previous plan was included in collective bargaining agreements between plaintiff and each of the defendants, BRT, BLFE and ORCB, on behalf of the respective class or craft of plaintiff's employees represented by such labor organizations.

The brotherhood defendants sought pension benefits different from and in addition to those available under II-B.

On October 1, 1959, each brotherhood served notice on plaintiff pursuant to Section 6 of the Railway Labor Act. The notice was as follows:

> "Kindly consider this as a thirty (30) day notice under the provisions of Section 6 of the amended Railway Labor Act to extend the current Non-Contributory Pension Agreement [H-B] between the Elgin, Joliet and Eastern Railway Company and the [BRT, ORCB, and BLFE] effective November 1, 1957, until such date when the United States Steel Workers reach an agreement on a Non-Contributory Pension Plan, after which date, the above referred to Organization[s] shall have the option of substituting the new pension plan (being negotiated by the United States Steel Workers) in place of the pension plan now in effect covered by the aforementioned pension agreement; and or also have the option to renew, modify, or change the above referred to pension agreement as may be deemed advisable."

All three brotherhoods requested joint handling of their notices, and this procedure was followed between the plaintiff and the brotherhoods in the collective bargaining conferences which followed. Paul H. Verd, Vice President of plaintiff, was its principal negotiator. He offered to grant extensions of plan H-B for periods of three years, two years or one year, but refused to consider extensions for shorter periods as requested by the brotherhoods.

At the date of the service of the Section 6 notice, a strike was in progress called by employees of United States Steel. This strike was settled about January 1, 1960, and in the settlement it was agreed there would be changes in the non-contributory pension plan between United States Steel Corporation and its employees represented by United States Steel Workers. A copy of the new plan was not available to the brotherhoods representing plaintiff's employees for some months thereafter. This new plan was known as Plan H-CR and was not discussed by

Mr. Verd until the joint conference held on February 23, 1961.

During the collective bargaining conferences, the brotherhoods urged plaintiff to restore or increase benefits theretofore paid to retired employees of plaintiff. Mr. Verd was of the opinion that he was not required by the Railway Labor Act to bargain with employees of plaintiff concerning the pension plan sought by the brotherhoods. However, he did, in fact, bargain upon the plan.

Joint conferences with respect to the Section 6 notice were held on October 26 and 27, 1959, without an agreement being reached. Largely due to the steel strike, a third conference was not held until July 29, 1960. Again, no agreement was reached.

The brotherhoods then requested intervention of the National Mediation Board. On August 22, 1960, the Board advised plaintiff and the brotherhoods that it had taken jurisdiction. The first joint mediation session was held on November 30, 1960. No further meetings were held until February 23, 1961. The final joint mediation conference was held on February 27, 1961, but no agreement was reached.

On March 8, 1961, the National Mediation Board proffered arbitration. The plaintiff accepted, but on March 10, 1961, all of the brotherhoods jointly rejected arbitration.

By letters dated March 13 and March 16, 1961, mediation services were terminated by the Board. On April 14, 1961, plaintiff sent telegrams to officials of defendant brotherhoods requesting further conferences which were held on April 19, 21 and 24, 1961, without an agreement being reached.

On May 16, 1961, the Board, by telegram, advised all parties that defendants had authorized a strike to begin

May 20, 1961, at 6 a.m. and requested the brotherhoods to defer strike action. However, the brotherhoods refused to comply with this request. On May 18, 1961, at 10 p.m., the National Executive Officials of the three defendant brotherhoods posted a notice on plaintiff's property, giving authority for a strike effective Saturday, May 20, 1961, at 6 a.m.

Although plaintiff's brief lists twenty-eight separately stated "contested issues," we think the issues in this case may be considered under five subheads.

I

Plaintiff contends the strike scheduled for May 20, 1961, was illegal because the National Mediation Board had not completed its emergency mediation. Plaintiff argues the Mediation Board's request of May 16, 1961, for further meeting, started the running of a "reasonable time" during which the strike would be illegal. Plaintiff does not suggest what period of time would meet such a test. It does not contend that any second 30-day *status quo* period was involved. The District Court pointed out that the resumption of mediation was on the agreement that defendants did not waive their right to strike pursuant to notices already served. We hold this first contention of plaintiff must be overruled.

II

Plaintiff also contends that the demands of the defendant brotherhoods regarding pension agreements were not a subject of mandatory collective bargaining because not included within the phrase "rates of pay, rules, and working conditions" as those terms are used in Sections 2 First, 2 Seventh and 6 of the Railway Labor Act (45 U. S. C. 152, 156). As a corollary to this contention, plaintiff alleges

that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons.

The Railway Labor Act does not specifically mention pension plans as a subject of mandatory collective bargaining. However, this Court, in *Inland Steel Co.* v. *NLRB*, 7 Cir., 170 F. 2d 247, construing similar language in the National Labor Relations Act, held that pension plans were properly the subject of mandatory collective bargaining. In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here. *McMullans, et al.* v. *Kansas, Oklahoma and Gulf Railway Co., Inc., et al.*, 10 Cir., 229 F. 2d 50, 54-55.

We do not reach the contention that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons. The District Court in its Findings of Fact stated, ". . . Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees. . . ." In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question.

III

Plaintiff further contends that the scheduled strike was illegal in that the brotherhoods failed to make every reasonable effort to settle all disputes and did not accept arbitration.

Arbitration under the Railway Labor Act is voluntary, not compulsory. Section 7 First of the Railway Labor Act

(45 U.S.C. 157) provides in part: "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

While it is possible that a refusal to arbitrate might be a factor in determining whether every reasonable effort was made to settle all disputes, the refusal to arbitrate in and of itself does not constitute a failure to make every reasonable effort to settle all disputes. To hold that the failure to arbitrate, *per se*, is the failure to exert every reasonable effort to make agreements and settle all disputes, would make a nullity of Section 7.

Plaintiff relies on *Brotherhood of Railroad Train. en. Enterprise Lodge, No. 27, et al. v. Toledo, Peoria & Western Railroad*, 321 U.S. 50. The Supreme Court, in that case, held that Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108) would bar a complainant from injunctive relief if he had not submitted the dispute to arbitration. The Court stated, at page 63:

> "Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it choses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

It must be conceded that the language used by the Court, " . . . and the right to have the aid of equity in a federal court" is very broad. However, construing it in context with the other language used in the paragraph

hereinbefore quoted, we hold Section 8 is not applicable to the brotherhoods in the case at bar. The brotherhoods were not seeking injunctive relief and failure to arbitrate did not violate the Railway Labor Act.

The application of Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) is not affected by the failure of the brotherhoods to arbitrate. Section 4 is applicable to the dispute under consideration and it operates so as to prevent the granting of injunctive relief to plaintiff.

We hold that plaintiff's argument that defendant brotherhoods failed to make every reasonable effort to settle the dispute, is without merit.

IV

Plaintiff argues that conduct which violates the provisions of the Railway Labor Act may be enjoined in spite of the Norris-LaGuardia Act. However, it is admitted by plaintiff that the disputed question is a "major dispute." The Supreme Court has held that Section 4 of the Norris-LaGuardia Act is applicable to "major disputes" within the meaning of the Railway Labor Act. *Order of Railroad Telegraphers, et al.* v. *Chicago & North Western Railway Co.*, 362 U.S. 330.

This question needs no further discussion here. Plaintiff's argument is based upon the proposition that the brotherhoods' conduct in this case violated the Railway Labor Act. We have held to the contrary. We hold the District Court was correct in holding that it was deprived of jurisdiction to issue an injunction by reason of the provisions of the Norris-LaGuardia Act.

V

Plaintiff urges error on the part of the trial court in awarding attorney's fees to the defendant brotherhoods. We find this contention to be without merit. Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) provides in part:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court."

There was no error in the awarding of attorney's fees to the defendant brotherhoods.

We have considered all of plaintiff's contentions and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS,

For The Seventh Circuit,

Chicago 10, Illinois.

Friday, May 4, 1962.

Before

Hon. F. Ryan Duffy, *Circuit Judge*.
Hon. Wm. G. Knoch, *Circuit Judge*.
Hon. Roger J. Kiley, *Circuit Judge*.

Elgin, Joliet and Eastern Railway Company *Plaintiff-Appellant,* *vs.* Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13444

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 21, 1961, in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

APPENDIX B

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no

injunction or temporary restraining order shall be issued on account of any threat or unlawful act except-ing against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erro-

neous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. Nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 72, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.